



UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737 Civil.

HEILIG BROS. COMPANY, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Review of an Order of the National Labor Relations Board.

PETITION.

To the honorable Judges of the United States District Court for the middle district of Pennsylvania:

Your petitioner, Heilig Bros. Company, with its principal place of business in the City of York, County of York and State of Pennsylvania, respectfully shows that:

1. Your petitioner was the respondent company in a matter entitled "In the Matter of Heilig Bros. Co., and Local Union No. 2151, Steel Workers' Organizing Committee." Said case has been further designated by the National Labor Relations Board as Case C-1609.

2. On or about the 17th day of April, 1940, the National Labor Relations Board, hereinafter called the Board, through its Regional Director for the Fourth Region (said Fourth Region having its offices in Philadelphia, Pennsylvania) issued its complaint against Heilig Bros. Co., your petitioner herein, alleging said Company had engaged in and was engaging in certain unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3) and (5), and Section 2 (6) and (7), of the National Labor Relations Act.

3. A hearing was thereafter held and subsequently the Board, under authority conferred upon it, waived the issuance of the Trial Examiner's Intermediate Report, and

stated that Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order be issued.

4. On or about December 18th, 1940, the Board, in fact, did issue its Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order. Said Findings and Order found your petitioner herein had engaged in certain alleged unfair labor practices.

5. On or about January 9th, 1941, your petitioner duly filed exceptions to the Findings, Conclusion and Order, and thereafter and on or about February 4th, 1941, argued the matter orally before the Board in Washington, D. C.

6. On or about the 10th day of June, 1941, the Board issued its Decision and Order, which Decision and Order is in the nature of a final determination of said cause insofar as the Board is concerned.

7. By the terms of said Decision and Order the Board found that your petitioner had rightfully discharged Daniel Wagner and dismissed its complaint against your petitioner for alleged violations of Section 8 (1) and (3) of the Act, insofar as the same pertained to said Daniel Wagner. However, the Board found the petitioner herein to have violated Section 8 (1) and (5), of said Act, and to have indulged in unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

8. It is with respect to the said alleged violations as charged by the Board in its Decision and Order that your petitioner takes issue, and your petitioner respectfully urges this Honorable Court to review the Order of said Board, wherein said Decision and Order finds your petitioner has violated Section 8 (1) and (5) and Section 2 (6) and (7) of said Act.

9. This Honorable Court may be of the opinion that there is a jurisdictional question involved which would prevent it from taking cognizance of this matter wherein Section 10 (f) of the Act provides that "Any person aggrieved by a final order of the Board • • • denying in whole or in part the relief sought, may obtain a review of such

order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. "However, Section 10 (e) of the Act provides that

"The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeal to which application may be made are in vacation, any district court of the United States • • • within any • • • district wherein the unfair labor practice in question occurred or wherein such person resides or transacts business • • • for appropriate temporary relief or restraining order."

The Circuit Court of Appeals for the District wherein your petitioner resides and transacts its business is presently in vacation and will not reconvene for some time. Thus it is the contention of the petitioner that in order to expedite the review of this matter it may be brought within the jurisdiction of this Honorable Court, even though said remedy is not specifically afforded to your petitioner in the National Labor Relations Act.

Your petitioner further avers that it cannot at this time avail itself of the jurisdiction of the Court of Appeals for the District of Columbia, your petitioner having ascertained that said Court is also in vacation. It, therefore, appears that petitioner should be afforded the rights and remedies available to the Board under like and similar circumstances, it appearing that unless this Honorable Court will take cognizance of this matter that petitioner has no means of reviewing said Board's order at this time.

10. Section 10 (g) of the Act further provides that

"The commencement of proceedings under sub-section (e) or (f) of this section (quoted earlier herein) shall not,

unless specifically ordered by the Court, operate as a stay of the Board's order."

Your petitioner respectfully prays that at the time this Honorable Court assumes jurisdiction herein, that said Court will grant to petitioner an order staying any further action on the part of the Board, pending final determination hereof.

11. Your petitioner alleges that the Board, in its Decision and Order, directed petitioner to take certain affirmative action more particularly referring to Section 1 (a) and Section 2 (b), (c) of the Order, although by specifically referring to the within sections petitioner does not want to limit the attention of the Court to those sections alone, but respectfully requests this Honorable Court to review the case in its entirety.

12. Your petitioner respectfully urges as some of the grounds for reversal and which may be summarized as follows:

(a) There does not appear in the record competent substantial evidence to support the Board's finding of an alleged refusal to bargain with the complaining union;

(b) The record fails to disclose competent substantial evidence of unfair discrimination on the part of petitioner against any of its employees;

(c) The petitioner was deprived of its right to full cross examination on one or two occasions during the course of the hearing; Petitioner herein was the respondent at that time;

(d) The Board failed to sustain its charges and allegations by a preponderance of the evidence, as required by law;

(e) Your petitioner reserves the right to file additional grounds of appeal in lodging the record with the Court.

13. Certified copies of this Appeal and any order to be made thereunder shall be sent to the Regional Director of the National Labor Relations Board, for the Fourth Region,

and to Michael Harris, of the Steel Workers' Organizing Committee.

14. In conclusion, therefore, your petitioner respectfully urges this Honorable Court to review the matter in issue, to grant to petitioner an order staying any further action on the part of the National Labor Relations Board, pending determination herein, and to set aside the order of the Board hereinbefore referred to.

And your petitioner will ever pray, &c.

JOHN A. HOOBER,
124 East Market Street,
York, Pennsylvania,
 JOHN F. DUMONT,
#85 Main Street,
Little Falls, New Jersey,
Attorneys for Petitioner.

STATE OF PENNSYLVANIA,
 County of York, ss:

Before me the undersigned a Notary Public in and for said County and State personally appeared Cyrus H. Heilig, president of the above named petitioner, who being affirmed according to law avers that the facts set forth are true and correct to the best of his knowledge, information and belief.

CYRUS H. HEILIG.

Affirmed and subscribed to before me this 8th day of August, 1941.

MYRTUS E. MICKLEY OLP,
 [SEAL.] *Notary Public.*

My Commission Expires March 9, 1943.

Certified from the record. Date Apr. 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] United States District Court for the Middle District of Pennsylvania. 737 Civil. Heilig Bros. Company, Petitioner, vs. National Labor Relations Board, Respondent. On Petition for Review of an Order of the Na-

tional Labor Relations Board. Petition. John A. Hoober, 124 East Market Street, York, Pennsylvania; John F. Dumont, #85 Main Street, Little Falls, New Jersey, Attorneys for Petitioner. Filed Aug. 14, 1941. W. H. Mitchell, Clerk.

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737 Civil.

HEILIG BROS. COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

AFFIDAVIT OF SERVICE.

DISTRICT OF COLUMBIA, *ss*:

I, Vernon S. Green, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 6th day of September 1941, I mailed postpaid, by registered mail bearing Government frank, one copy of the motion to dismiss for lack of jurisdiction over the subject matter to the following named person, at the following address:

John F. Dumont, Esquire
85 Main Street
Little Falls, New Jersey

VERNON S. GREEN.

Subscribed and sworn to before me this 8th day of September 1941.

DANIEL T. GHENT, JR.,
Notary Public, District of Columbia.

My Commission expires August 31, 1944.

[Endorsed:] No. 737 Civil. Heilig Bros. Co. vs. N. L. R. B. Affidavit of Service. Filed Sep. 10, 1941. W. H. Mitchell, Clerk, Per L., Dept.

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

737 Civil.

HEILIG Bros. Co., *Petitioner*,
vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Review of an Order of the National Labor
Relations Board.

BY WAY OF ANSWER TO RESPONDENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER.

To the Honorable the Judges of the United States District
Court for the Middle District of Pennsylvania:

Heilig Bros. Co., your Petitioner herein, respectfully
submits that it has been served with a copy of a Notice
of Motion to Dismiss the Petition hereinbefore filed by it,
which Notice of Motion suggests that said Petition should
be dismissed because of the lack of jurisdiction of this
Honorable Court over the subject matter herein. Heilig
Bros. Co. respectfully submits this by way of answer to
said Notice of Motion and shows as follows:

1. Your Petitioner avers that the contention of the
Respondent is erroneous wherein Respondent states that
this Honorable Court is without jurisdiction, inasmuch as
the Petitioner in this Petition has set forth certain sections
of the Act upon which it submits that relief cannot be
granted to one of two parties in dispute without affording
the other party the right to relief as well.

2. Your Petitioner respectfully calls to the attention of
this Honorable Court Paragraph 9 and Paragraph 10 of
its Petition, and prays leave to incorporate said aforemen-
tioned paragraphs in this answer, making them a part hereof
without repeating said paragraphs verbatim.

3. Your Petitioner submits that the contention of Respond-
ent in its Motion to Dismiss said Petition for lack of juris-

dition over the subject matter is erroneous in that such Motion for Dismissal, were same to be acted upon, would deprive Petitioner of certain rights which have accrued to Petitioner even though the same are not specifically stated in the National Labor Relations Act.

4. Your Petitioner in referring more specifically to Respondent's Motion to Dismiss takes issue with respondent in connection with the numbered paragraphs set forth in said Motion as follows:

(1) By way of response to Paragraph 1 your Petitioner refers to Paragraphs 9 and 10 of said Petition particularly referring to Paragraph 9 together with the reasons set forth therein.

(2) The Petitioner takes issue with Paragraph 2 of Respondent's Motion to Dismiss and again refers this Honorable Court to Paragraph 9 of the Petition hereinbefore filed by the Petitioner.

(3) As to Paragraph 3 of Respondent's Motion to Dismiss, your Petitioner respectfully submits that the law stated therein is misleading and not herein applicable.

(4) As to Respondent's contentions as set forth in Paragraph 4 of the Notice of Motion; your Petitioner avers that the law therein stated is not applicable, in view of the fact that your Petitioner well knows that Congress has the right to confer reviewing powers to the Circuit Courts of Appeals. However, your Petitioner maintains that the Board is given certain rights within the District Court of the United States in such cases wherein the Circuit Courts are on vacation, and it is the contention of your Petitioner that such rights cannot be given to one party to a suit without affording the other party equal remedies.

(5) By way of response to Paragraph #5 of Respondent's Notice of Motion it appears to Petitioner that Respondent's choice of law is illfounded wherein the facts and matters therein contained are in no wise comparable with the matter in issue.

(6) As to Paragraph #6 in Respondent's Notice of Motion your Petitioner respectfully submits that it is for this Honorable Court to determine as to whether it can assume jurisdiction and your Petitioner respectfully submits that this Honorable Court would be depriving Petitioner of its Constitutional right to its day in Court were this Honorable Court to forthwith dismiss said Petition.

5. In conclusion, therefore, your Petitioner respectfully urges this Honorable Court to dismiss Respondent's Motion.

And your Petitioner will ever pray.

JOHN F. DUMONT,
85 Main Street,
Little Falls, N. J.

JOHN A. HOOBER,
124 East Market St.,
York, Pennsylvania.

[SEAL.]

Certified from the record. Date April 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] United States District Court for the Middle District of Pennsylvania. Heilig Bros. Co., Petitioner, vs. National Labor Relations Board, Respondent. Copy. By Way of Answer to Respondent's Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter. John F. Dumont, Attorney for Petitioner, 85 Main Street, Little Falls, N. J. John A. Hoober, Attorney for Petitioner, 124 E. Market St., York, Pennsylvania. Filed Sep. 11, 1941. W. H. Mitchell, Clerk, Per — — —, Dept.

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

737 Civil.

HEILIG BROS. COMPANY, *Petitioner*,*v.*NATIONAL LABOR RELATIONS BOARD, *Respondent*.On Petition for Review of an Order of the National Labor
Relations Board.MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUB-
JECT MATTER*To the Honorable the Judges of the United States District
Court for the Middle District of Pennsylvania:*

Comes now the National Labor Relations Board, respondent herein, and moves this Court to dismiss the petition filed herein to review an order of the Board. In support of said motion, the Board respectfully shows as follows:

1. After due proceedings under the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151 *et seq.*), the Board on June 10, 1941, issued an order against the petitioner. Thereafter a petition to review was filed with this Court in which jurisdiction is sought to be conferred on this Court by virtue of a contention that Section 10 (e) of the Act is equally applicable to petitioner, as well as to the Board (see paragraph 9 of petition, pages 3 and 4). That such a contention is clearly erroneous becomes evident when subsections (e) and (f) of Section 10 of the Act are examined in their entirety. Said subsections provide as follows:

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit court of appeals to which application may be made are in vacation, any district court of the United States

(including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made

to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

2. These subsections of the Act, set forth above, are explicit as to what courts of the United States shall be empowered to review, or enforce orders of the Board. Section 10 (e) is devoted exclusively to the institution of proceedings by the Board for the enforcement of its orders, and commences, "*The Board shall have the power*", while Section 10 (f) is devoted solely to the institution of proceedings by a party aggrieved by an order of the Board, and commences, "*Any person aggrieved*". Provision is not only made for the courts in which the power of appellate

jurisdiction is vested, but also, it is provided that the courts so vested shall have *exclusive jurisdiction*. The Act is unambiguous in these respects.

3. Congress has conferred reviewing powers on the Circuit Courts of Appeals of the United States under the Act, and this power may not be extended beyond what is definitely conferred by its terms. *Pote v. Federal Radio Commission*, 67 F. (2d) 509 (App. D. C.); *Universal Service Wireless, Inc. v. Federal Radio Commission*, 41 F. (2d) 113, 115 (App. D. C.). The Court, in the *Pote* case, in dismissing an appeal therein for lack of jurisdiction, stated:

The right of appeal to this court from any decision of the Federal Radio Commission is not allowed as a matter of course, but is purely statutory, and the terms of the statute must be strictly followed. As was said by us in *Universal Service Wireless, Inc., v. Federal Radio Commission*, 59 App. D. C. 319, 41 F. (2d) 113, 115:

"The right of appeal being a statutory one, this court cannot dispense with its express provisions, even to the extent of doing equity."

4. That Congress has the right to confer reviewing powers on the Circuit Courts of Appeals, and the constitutionality of this right, has already been decided by the Supreme Court. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46, 47. Here the Supreme Court stated:

* * * The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to administrative

agencies set up by Congress to aid in the enforcement of valid legislation.

5. The lack of jurisdiction of this Court, or any District Court, as pertains to the review of orders of the Board has been decided by the Supreme Court. *Myers, et al. v. Bethlehem Shipbuilding Corp., Ltd.*, 303 U. S. 41, 48, where the Court said:

Second. The District Court is without jurisdiction to enjoin hearings because the power "to prevent any person from engaging in any unfair practice affecting commerce", has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."⁵ The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board.

On page 50 of this opinion the Supreme Court further stated:

"Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and

⁵ Compare House Committee Report, H. R. Rep. 1147, 74th Cong., 1st Sess., p. 24: "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may claim a review of such order in the appropriate circuit court of appeals, or in the Court of Appeals of the District of Columbia. It is intended here to give the party aggrieved a full, expeditious, and exclusive method of review in one proceeding after a final order is made. Until such final order is made the party is not injured, and cannot be heard to complain, as has been held in cases under the Federal Trade Commission Act."

the Circuit Court of Appeals. *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 343-346."

6. It is submitted therefore, that as Congress has by statute conferred exclusive jurisdiction upon the Circuit Courts of Appeals of the United States to review orders of the National Labor Relations Board, this action has been improperly brought and should be forthwith dismissed.

It is accordingly prayed that the petition be dismissed for lack of jurisdiction over the subject matter.

Respectfully submitted,

(S.) ERNEST A. CROSS,
Assistant General Counsel,
NATIONAL LABOR RELATIONS BOARD.

[Endorsed:] 737 Civil. Heilig Bros. Co. v. N. L. R. B.
Motion to Dismiss. Filed Sep. 11, 1941. W. H. Mitchell,
Clerk, Per L., Dept.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737, Civil.

HEILIG BROS., Co., *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Review of an Order of the National Labor
Relations Board.

NOTICE OF MOTION.

To: John F. Dumont, Esquire, 85 Main Street, Little Falls,
N. J., and John A. Hoober, Esquire, 124 E. Market Street,
York, Pa., Attorneys for Plaintiff:

Please Take Notice, that the undersigned will bring on
its Motion to Dismiss for Lack of Jurisdiction over the

subject matter, previously served upon you, for hearing before this Court at the Court Room, United States Post Office and Courthouse, Scranton, Pennsylvania, on the 6th day of October, 1941, at 11 o'clock, Eastern Standard Time, in the forenoon of that day, or as soon thereafter as counsel can be heard.

[SEAL.]

LAURENCE A. KNAPP,
Associate General Counsel.

Dated at Washington, D. C., this 19th day of September, 1941.

Certified from the record. Date Apr. 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] 737 Civil. Heilig Bros. vs. N. L. R. B. Notice of Motion. Filed Sep. 22, 1941. W. H. Mitchell, Clerk, Per L., Dept.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737, Civil.

HEILIG BROS., Co., *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Review of an Order of the National Labor Relations Board.

AFFIDAVIT OF SERVICE.

DISTRICT OF COLUMBIA, ss:

I, Vernon S. Green, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 19th day of September, 1941, I mailed postpaid, by registered mail bearing Government frank,

one copy each of the Board's Notice of Motion to the following named persons, at the following address:

John F. Dumont, Esquire, 85 Main Street, Little Falls,
N. J.

John A. Hoober, Esquire, 124 E. Market Street, York, Pa.

VERNON S. GREEN.

Subscribed and sworn to before me this 20th day of September 1941.

DANIEL T. GHENT, JR.,
Notary Public, District of Columbia.

My Commission expires Aug. 31, 1944. [Seal].

Certified from the record. Date Apr. 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] 737 Civil. Heilig Bros. vs. N. L. R. B. Affidavit of Service. Filed Sep. 22, 1941. W. H. Mitchell, Clerk, Per L., Dept.

Duplicate.

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

No. —.

HEILIG BROS. COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

AFFIDAVIT OF SERVICE.

DISTRICT OF COLUMBIA, ss:

I, Vernon S. Green, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 6th day of September 1941, I mailed postpaid, by registered mail bearing Government frank,

one copy of the motion to dismiss for lack of jurisdiction over the subject matter to the following named person, at the following address:

John F. Dumont, Esquire, 85 Main Street, Little Falls, New Jersey.

VERNON S. GREEN,

Subscribed and sworn to before me this 8th day of September 1941.

DANIEL T. GHENT, JR.,
[SEAL.] *Notary Public, District of Columbia.*

My commission expires August 31, 1944.

Certified from the record. Date Apr. 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] 737 Civil. Heilig vs. N. L. R. B. Proof of Service of Motion. Filed Sep. 23, 1941. W. H. Mitchell, Clerk, Per L., Dept.

NATIONAL LABOR RELATIONS BOARD.

Washington, D. C.

Office of the General Counsel.

September 24, 1941.

W. H. Mitchell, Esquire,
Clerk, United States District Court for
the Middle District of Pennsylvania,
Scranton, Pennsylvania.

Re: Heilig Bros. Company v. National Labor Relations Board, No. 737 Civil.

DEAR MR. MITCHELL:

Will you please enter my appearance on behalf of the Board in the above-entitled matter.

Sincerely yours,

(Miss) RUTH WEYAND,
Attorney,
National Labor Relations Board,
[SEAL.] *Washington, D. C.*

Certified from the record. Date Apr. 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] 737 Civil. Heilig Bros. vs. N. L. R. B. Praecipe for Appearance. Filed Sep. 26, 1941. W. H. Mitchell, Clerk, Per L. Dept.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737 Civil.

HEILIG BROTHERS COMPANY, *Petitioner*,
vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

MOTION TO DISMISS.

Appearances.

For Petitioner:

John A. Hooper, Esquire, 124 East Market Street,
York, Pennsylvania.
John F. Dumont, Esquire, 85 Main Street, Little Falls,
New Jersey.

For Respondent:

Miss Ruth Weyand, Attorney, National Labor Relations Board, Washington, D. C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737 Civil.

HEILIG BROS. COMPANY, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

MOTION TO DISMISS.

ORDER OF COURT.

This is a petition to review an order of the National Labor Relations Board, respondent herein. The respondent has moved the court to dismiss this action for lack of jurisdiction. After hearing oral argument upon the motion to dismiss, the court has decided that the motion must be granted.

The National Labor Relations Act prescribes the procedure for reviewing orders made by the National Labor Relations Board. That Act provides that petitions to review orders of the board shall be filed in the Circuit Court of Appeals. Petitioner here claims that because the Circuit Court of Appeals was in vacation at the time this petition was filed, it had a right to file the petition in a District Court. Petitioner bases this argument upon the provisions of the Act which allow the National Labor Relations Board seeking an enforcement order, to apply to a District Court for such order, if the Circuit Court is in vacation at the time. However, there is no such provision in the Act relating to the filing of petitions for review.

The Board's petition to enforce its own order is entirely different and distinct from a party's petition for review. The petition for enforcement is one that may be for the benefit of either or both parties, and either or both parties, if aggrieved, must go to the Circuit Court of Appeals for review. Enforcement and review are two distinct proceedings, provided for in different subsections of the Act of Congress. Petitioner could have filed its petition for

review in the Circuit Court even though that court was in vacation, which petition would have been decided before the board's petition for enforcement, filed at a later date. Petitioner can now go to the Circuit Court of Appeals and file an answer to the Board's petition for enforcement, in which case the merits of the Board's decision will be reviewed.

And now, December 10, 1941, the motion to dismiss is sustained, the petition for review is dismissed, and an exception is granted the petitioner.

ALBERT W. JOHNSON,
[SEAL.] *United States District Judge.*

[Endorsed:] No. 737 Civil, In the District Court of the United States for the Middle District of Pennsylvania. Heilig Brothers Company vs. National Labor Relations Board. Order of Court. Filed Dec. 10, 1941. W. H. Mitchell, Clerk, Per W., Dept.

UNITED STATES OF AMERICA,
Middle District of Pennsylvania, ss:

I, W. H. Mitchell, Clerk of the United States District Court in and for the Middle District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original Docket Entries; Petition for Review; Affidavit of Service; Answer of Plaintiff; Motion of Defendant to Dismiss; Notice of Motion; Affidavit of Service of Notice; Affidavit of Service of Motion; Praecept for Appearance and Order of Court, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Scranton, Pennsylvania, this 15th day of April, A. D. 1942.

W. H. MITCHELL,
Clerk.
by M. W. MAXEY,
Deputy Clerk. (Seal.)

APPENDIX B.

Section 10, (e), (f) and (g) of National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Sec. 151 et seq.)

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such ad-

ditional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

APPENDIX C.

Sec. 2 (3) of National Labor Relations Act and Sec. 10 (c) of National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Sec. 151 et seq.)

Sec. 2 (3)—“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.”

Sec. 10 (c)—“The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

APPENDIX D.**PETITION FOR REHEARING IN CIRCUIT COURT OF APPEALS.**

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941.

No. 7859.

Decided January 2nd, 1942.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

HEILIG BROS. CO., *Respondent*.

On Petition for the Enforcement of an Order of the National Labor Relations Board.

PETITION OF RESPONDENT FOR REHEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Your petitioner, the respondent herein, in accordance with the rules established by this Court, respectfully submits its petition for rehearing, and bases its plea upon the grounds hereinafter set forth:

1. This Honorable Court in a "*per curiam*" opinion filed January 2nd, 1942, rendered a decision by the terms of which decision the respondent company, the petitioner herein, was ordered to abide by the findings of the National Labor Relations Board, and this Honorable Court ordered that the Order of the National Labor Relations Board be enforced.

2. Your petitioner herein respectfully urges this Honorable Court to reconsider its decision and to permit your petitioner a rehearing, particularly calling to the atten-

tion of this Honorable Court those parts of the Order which are hereinafter quoted:

Sub-section b in Paragraph 1 of the Order reads as follows:

"In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Sub-Section d in paragraph #2 of the Order states:

"Post immediately in conspicuous places at its York plant, and maintain for a period of at least (60) consecutive days from the date of posting, notices to its employees stating (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order and (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a), (b), and (c) of this Order."

3. The United States Supreme Court on the 22nd day of December, 1941, delivered its opinion in a case entitled "*National Labor Relations Board vs. the Virginia Electric and Power Company, and National Labor Relations Board vs. Independent Organization of Employees of the Virginia Electric and Power Company*". In that case the question of constitutional rights of an employer was determined, referring more specifically to the First Amendment of the United States Constitution. Prior to the delivery of said opinion the Board's usual interpretation of the Act was that an employer was not permitted to state the position of the Company with regard to employee organization, more particularly if such statements could be construed to mean that an employer was opposed to organization in the plant.

4. The Petitioner briefly calls attention to certain parts of the decision hereinbefore cited and asks the liberty of comparing certain phases of the case in issue, and the case presently decided by the United States Supreme Court.

In the case at issue the Board has dwelt at length upon the fact that the petitioner, has, at all times, been hostile to labor organizations. Furthermore the Board has said that certain statements made by Cyrus H. Heilig, even though uncorroborated, and certain notices which were caused to be posted by the Management, were coercive and that such action on the part of the Company was taken with the sole purpose of discouraging unionization. The same situation apparently exists, or did exist, in the case decided by the United States Supreme Court, which prior to that time had been determined by the United States Circuit Court of Appeals for the Fourth Circuit, both decisions having been unfavorable to the National Labor Relations Board.

5. Your petitioner respectfully submits that the case at bar wherein it has been accused of violating sections 8 (1) and (5) of the National Labor Relations Act is distinctly on point with the decision in the *Virginia Electric and Power Company* case. The National Labor Relations Board presented its petition for enforcement of its Order during the October term of 1941. An answering brief was thereupon filed by the respondent and the case was argued orally before this Honorable Court during December of 1941, but prior to the time that the decision was rendered in the *Virginia Electric and Power Company* case. Your petitioner is of the opinion that such case has an important bearing upon some of the points at issue and respectfully submits that it should be given an opportunity to enlarge upon similar circumstances appearing in the case at bar and in the *Power Company* case.

6. Your petitioner is desirous of securing a rehearing upon the entire case generally, but specifically upon those parts of the Order which would be affected by the decision hereinbefore previously referred to.

And your petitioner will ever pray, &c.

JOHN F. DUMONT,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

Affidavit of Good Faith.

STATE OF NEW JERSEY,
County of Passaic, ss:

John F. Dumont, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am a New Jersey attorney admitted to practice before this Court, and I represent Heilig Bros. Co., the petitioning party herein.

2. I have filed said petition for rehearing primarily because of a new United States Supreme Court decision handed down by said Supreme Court about the same time a decision was rendered in this matter by this Honorable Court. The Supreme Court decision hereinbefore referred to has an important bearing upon the case at issue.

3. The petition herein filed has been filed by me in good faith for the reasons expressed therein, and said petition for rehearing has not been filed for the purpose of delay, but rather to insure to the petitioner herein all rights accruing to it.

JOHN F. DUMONT,
Attorney for Petitioner.

Sworn and subscribed to before me this 14th day of January, 1942.

IRENE FERRAZANO,
Notary Public of N. J.

